

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of the Fair Hearing Request of:

GIOVANNI R.,

Claimant,

vs.

SAN GABRIEL/POMONA REGIONAL
CENTER,

Service Agency.

Case No. 2011100021

DECISION GRANTING THE APPEAL

This matter was heard by Eric Sawyer, Administrative Law Judge, Office of Administrative Hearings, State of California, on November 2, 2011, in Pomona. The record was closed and the matter submitted for decision at the conclusion of the hearing.

Giovanni R. (Claimant) was present and represented himself.¹

Daniela Martinez, Fair Hearing Manager, represented the San Gabriel/Pomona Regional Center (Service Agency).

ISSUE

Is Claimant eligible for regional center services under the Lanterman Developmental Disabilities Services Act (Lanterman Act)?

FACTUAL FINDINGS

Claimant Previously Received Regional Center Services

1. In 1995, when Claimant was approximately five-years-old, he was evaluated and deemed eligible for services under the Lanterman Act by the Service Agency on the basis of a diagnosis of mild mental retardation made by clinical psychologist Frank J. Trankina, Ph.D.

¹ Initials and family titles are used to protect the privacy of Claimant and his family.

2. Claimant thereafter received services funded by the Service Agency, as well as special education services from his local school district. However, a Service Agency progress report for the period ending March of 1999 indicated that Claimant was doing well in school, and that the Service Agency was no longer funding any services for him or his family, except for funds for the family to purchase a refrigerator.

3. A note in Claimant's Service Agency file indicates that in September of 1999, Claimant's mother requested that Claimant's case with the Service Agency go on inactive status because she felt her son "does not have mental retardation." In October of 1999, the Service Agency inactivated Claimant's file.

4. In May of 2002, Claimant was referred for a psychological evaluation by the California Department of Social Services (DSS) to assist in determining whether he was eligible for unspecified services. At that time, Claimant was 11 years old. He was evaluated by licensed psychologist Jack Stephenson, Ph.D. In his report from that evaluation, Dr. Stephenson noted that Claimant "is reportedly functioning generally at expected levels in activities of daily living, communication, and socialization." A number of academic, cognitive and adaptive functioning tests were administered to Claimant. Dr. Stephenson interpreted the various scores as indicating that Claimant was functioning in the low-average-to-average ranges. Dr. Stephenson questioned why Claimant was a special education student in light of his "strong academic skills." Dr. Stephenson made no Axis I or II diagnoses, meaning he did not diagnose Claimant with autistic disorder or mental retardation. In fact, Dr. Stephenson noted that Claimant "did not appear to have any clinical diagnosis."

5. By August 31, 2007, the Service Agency lost all contact with Claimant and his family, and was unable to locate them. According to the Service Agency records, the last contact with the family was in August of 2006. Several unsuccessful attempts were made to locate Claimant and his family. On June 30, 2008, a letter was sent to the family's last known address requesting that they contact the Service Agency. Since the Service Agency had not heard from Claimant's family, the decision was made to inactivate Claimant's case.

6. On or about July 15, 2008, Service Agency staff sent a letter to the last known address of Claimant's mother, advising her that the Service Agency had been unable to contact her after several attempts, and that staff assumed the family did not wish to receive services from the Service Agency. The letter further advised Claimant's mother that her son's case was being inactivated, and that "at such time in the future as you do request Regional Center services, [the Service Agency] may make an assessment to determine whether Giovanni still qualifies for Regional Center services." Finally, Claimant's mother was advised that she could request a fair hearing to review "either the proposed inactivation of Giovanni's Regional Center case or the proposed redetermination of his eligibility for Regional Center services." No evidence presented indicates that the family ever responded.

Claimant's Current Request for Services

7. On May 4, 2011, Claimant contacted the Service Agency by telephone and requested reactivation of his case. He stated that he had been in denial all of his life about his disability and now realizes that he needs services. The Service Coordinator who received the call took further information from Claimant's mother.

8. On May 17, 2011, a social assessment of Claimant was conducted by an Intake Vendor of the Service Agency. During this process, the Intake Vendor learned of the psychological evaluation done by Dr. Stephenson at the request of the DSS. The Intake Vendor noted that Claimant's test scores with Dr. Stephenson were inconsistent with Claimant's prior diagnosis of mild mental retardation. In any event, Claimant was referred for a psychological evaluation for purposes of determining his current level of cognitive and adaptive functioning.

9. (A) On June 15, 2011, licensed psychologist Pean Lai, Ph.D. conducted a psychological assessment of Claimant. Dr. Lai reviewed records, interviewed Claimant and his mother, and administered a number of tests to Claimant.

(B) The results of the Wechsler Adult Intelligence Scale- Fourth Edition (WAIS-4) were mixed. Claimant's verbal comprehension score of 74 demonstrates skills near borderline of mental retardation. Yet his score of 100 in perceptual reasoning is solidly in the average range. Therefore, Dr. Lai concluded that Claimant's full scale IQ of 82 was not representative of his overall cognitive ability, because there was a significant discrepancy between his verbal and non-verbal abilities. The results of the Vineland-II Adaptive Behavior Skills (VABS-II) were more consistent. Claimant's scores in the communication, daily living skills and socialization domains were in the high 80s, indicative of adequate range functioning. His overall score of 84 was indicative of moderate-low range ability.

(C) Dr. Lai concluded that Claimant's intellectual abilities were much higher than those possessed by a mentally retarded person. Dr. Lai also concluded that Claimant's presentation during the interview and testing was inconsistent with autism. Dr. Lai recommended that a Learning Disorder Not Otherwise Specified be ruled out, and made no Axis II diagnosis. This means that Dr. Lai did not diagnose Claimant with autistic disorder or mental retardation.

10. By a Notice of Proposed Action dated August 24, 2011, the Service Agency advised Claimant that it had confirmed the prior decision to close his case file. Based on the report issued by Dr. Lai, the Service Agency had concluded that Claimant was not mentally retarded, and did not have any of the other four conditions that would qualify him for regional center services.

11. On or about September 22, 2011, Claimant submitted a Fair Hearing Request.

Claimant's Current Situation

12. Very little information was presented concerning Claimant's status after the Service Agency initially inactivated his case file. It appears that Claimant graduated from high school with his typical peers, with little special education assistance. Although he is currently enrolled in a local junior college, he has been placed on academic probation for reasons not established. Claimant had one job briefly; he was terminated for failure to follow instructions. Claimant testified that he has recently been hired at a fast food restaurant, but was still in the process of training. He rents a room from a family friend, but the rent is paid by his parents. Food is brought to him by his mother. Although he is responsible for dressing himself and his hygiene, he is known to spend several days at a time confined to his room due to depression and lack of motivation.

13. Claimant testified. He was perfectly conversant. He answered questions without hesitation. He behaved appropriately and seemed to appreciate the seriousness of the proceedings. Although Claimant was able to communicate clearly, the logic of what he was saying was not always clear. Some of his arguments did not have a logical sequence.

14. Claimant testified that when he was younger, he denied to himself and others that he was disabled. He did not believe then that he was mentally retarded. However, he now is questioning that. He believes he has mental deficiencies that are similar to a mentally retarded person. For example, he has difficulty remembering things. He testified that he did not perform as well at school as has been described in the records. He is having trouble in junior college and believes he needs assistance or else he will be expelled. He also believes he needs a job coach, because he has had difficulty finding and keeping a job. He is depressed and is interested in psychological services to get to the root of a problem he feels the need to confess concerning his parents and his upbringing.

LEGAL CONCLUSIONS

Jurisdiction and Burden of Proof

1. The Lanterman Act governs this case. (Welf. & Inst. Code, § 4500 et seq.²) An administrative hearing to determine the rights and obligations of the parties, if any, is available under the Lanterman Act to appeal a contrary regional center decision. (§§ 4700-4716.) Claimant requested a hearing, so jurisdiction for this appeal was established.

2. Where an applicant seeks to establish eligibility for government benefits or services, the burden of proof is on him. (See, e.g., *Lindsay v. San Diego Retirement Bd.* (1964) 231 Cal.App.2d 156, 161 (disability benefits).) However, when a regional center seeks to terminate services provided to a consumer, it bears the burden to demonstrate its

² All further statutory references are to the Welfare and Institutions Code, unless otherwise specified.

decision is correct, because the party asserting a claim or making changes generally has the burden of proof in administrative proceedings. (See, e.g., *Hughes v. Board of Architectural Examiners* (1998) 17 Cal.4th 763, 789, fn. 9.)

3. The standard of proof in this case is the preponderance of the evidence, because no law or statute (including the Lanterman Act) requires otherwise. (Evid. Code, § 115.)

4. An applicant is eligible for services under the Lanterman Act if he can establish that he is suffering from a substantial disability that is attributable to mental retardation, cerebral palsy, epilepsy, autism or what is referred to as the fifth category. (§ 4512, subd. (a).) The “fifth category” is described as “disabling conditions found to be closely related to mental retardation or to require treatment similar to that required for mentally retarded individuals.” (§ 4512, subd. (a).) “The fifth category condition must be very similar to mental retardation, with many of the same, or close to the same, factors required in classifying a person as mentally retarded.” (*Mason v. Office of Administrative Hearings* (2001) 89 Cal.App.4th 1119, 1129.) A qualifying condition must also onset before one’s 18th birthday and continue indefinitely thereafter. (§ 4512.)

5. An individual who is determined by any regional center to be eligible for services by a regional center shall remain eligible for services from regional centers throughout the state unless a regional center, following a comprehensive reassessment, concludes that the original determination that the individual has a developmental disability is clearly erroneous. (§ 4643.5, subd. (b).)

6. Section 4710, subdivision (a)(1), provides that adequate notice shall be sent to an applicant for services or a consumer and his/her authorized representative, when the agency makes a decision without the mutual consent of the service recipient or authorized representative to reduce, terminate, or change services set forth in an individual program plan. Section 4710, subdivision (a)(2), requires similar adequate notice when a recipient of services is deemed to be no longer eligible for agency services. “Adequate notice” must be in writing and include the specific law that supports the proposed action. (§ 4701, subd. (d).)

7. In this case, the Service Agency failed to properly terminate Claimant’s status as a consumer eligible for regional center services. The notice given to Claimant’s family that his case was being inactivated in 2008 arguably could have qualified as adequate notice of the Service Agency’s proposal to terminate his services under section 4710, subdivision (a)(1). However, nowhere was it stated in the 2008 notice that Claimant was deemed to be no longer eligible for regional center services, nor was there any citation to section 4643.5. It was not established that the Service Agency conducted a comprehensive reassessment when it decided to inactivate his case. Therefore, the action to inactivate Claimant’s case in 2008 was valid only to the extent that the Service Agency proposed to provide him no further services. It was not valid for purposes of deeming that Claimant was no longer eligible for services. (Factual Findings 1-6.)

8. (A) When Claimant contacted the Service Agency in 2011 and requested reactivation of his case, the Service Agency treated the request as if Claimant was no longer a regional center consumer, and it improperly placed the burden on him to establish that he had a qualifying disability. In reality, the burden is on the Service Agency to establish that Claimant is no longer eligible for regional center services because the original determination in 1995 that he has mild mental retardation was clearly erroneous, as required by section 4643.5, subdivision (b). However, the notice sent to Claimant by the Service Agency did not contain a statement that Claimant was no longer eligible for services because the Service Agency's original determination was clearly erroneous, or a citation to section 4643.5. The notice issued by the Service Agency was therefore not adequate pursuant to section 4701.

(B) In any event, the Service Agency did not argue during the hearing, or present evidence establishing, that its original determination that Claimant was eligible for regional center services was clearly erroneous. As the party seeking to change the status quo, the burden is on the Service Agency to do so. The Service Agency simply argued that Claimant is not eligible for services because the psychological evaluations done in 2002 and 2011 did not result in a diagnosis that Claimant is mentally retarded. That argument misses the mark established by section 4643.5.

(C) Since Claimant was still a regional center consumer in 2011 when he contacted the Service Agency, and the Service Agency's notice that underlies this case was inadequate for purposes of litigating whether Claimant is no longer eligible for regional center services pursuant to section 4643.5, Claimant remains a Service Agency consumer eligible for services.³ (Factual Findings 7-11.)

9. Since Claimant is still a consumer of the Service Agency eligible for regional center services, he is entitled to the creation of an updated individual program plan (IPP) pursuant to section 4646. Claimant's request in May of 2011 to reactivate his case should have triggered the scheduling and completion of an IPP team meeting within 30 days pursuant to section 4646.5, subdivision (b). Therefore, the Service Agency shall forthwith schedule and convene an IPP meeting in conformity with section 4646 to create an updated IPP for Claimant. (Factual Findings 12-14.)

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³ Since the issue whether Claimant is no longer eligible for regional center services pursuant to section 4643.5 was not litigated in this case, the order herein is without prejudice to the Service Agency litigating that issue in another case. Based on Claimant's performance in the hearing in question, the ALJ is gravely concerned whether Claimant can adequately represent his own interests. Therefore, if the Service Agency does decide to litigate Claimant's continuing eligibility for services in the future, an appropriate authorized representative should participate, on behalf of Claimant.

ORDER

Claimant Giovanni R.'s appeal is granted. The San Gabriel/Pomona Regional Center's determination that he is not eligible for regional center services is overruled.

Claimant is a Service Agency consumer eligible for services pursuant to the Service Agency's determination in 1995. Within 30 days of the date of this Decision, the Service Agency shall schedule and convene an IPP team meeting pursuant to section 4646 to create an updated IPP for Claimant.

DATED: November 28, 2011

ERIC SAWYER,
Administrative Law Judge
Office of Administrative Hearings

NOTICE

This is the final administrative decision; both parties are bound by this decision. Either party may appeal this decision to a court of competent jurisdiction within 90 days.